PUNCA KLASIK SDN. BHD.

v.

LIZA JAMES & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: 24-234-1995]
11 JUNE 1996

CIVIL PROCEDURE: *Third-party proceedings – Third-party notice – Application for leave to issue – Failure to comply with O. 16 r. 2(2) of Rules of the High Court 1980 – Whether leave should be granted.*

CIVIL PROCEDURE: *Summary proceedings – Possession of land – Rules of the High Court 1980, O. 89 – Proceedings begun by Originating Summons – Defendant claimed to have entered land with consent – Whether O. 89 procedure appropriate – Whether action should have been commenced by writ – Whether a proper case for summary disposal.*

LAND LAW: *Indefeasibility of title and interests – Exceptions to indefeasibility not raised in affidavits – Whether exceptions could apply – National Land Code 1965, s. 340.*

CIVIL PROCEDURE: *Summary proceedings – Possession of land – Whether triable issue raised – Principles applicable – Rules of the High Court 1980, O. 89.*

SUCCESSION: *Administration – Deed of family arrangement – Administration of estate not complete – Residue not ascertained – Whether beneficiary has interest – Principles to be applied.*

EVIDENCE: *Judicial notice – Mohamedan law.*

WORDS & PHRASES: *'Trespasser'.*

This was an application by the plaintiff to recover possession of a piece of land in Johor Bahru ('the disputed land'), which was being occupied by the defendants, through summary procedure under O. 89 of the Rules of the High Court 1980 ('the RHC').

Subsequently, one of the defendants, Ungku Abdul Aziz Mohamed ('Ungku'), made an appplication for leave to issue a third-party notice. This appplication was dismissed by the learned Judge for non-compliance with paras. (a), (b) or (c) of r. 2(2) of O. 16 of the RHC, and for failure to show a *prima facie* case. Thereafter, the 1st defendant, Liza James, and three others, consented at the next hearing to surrender vacant possession of their houses to the plaintiff.

At the hearing of the plaintiff's application for the O. 89 judgment, Counsel for Ungku raised the preliminary objection that the procedure adopted by the plaintiff under O. 89 of the RHC was wrong, and that the correct procedure was by way of writ. It was argued that the 10,000 square feet of land ('the disputed portion') of the disputed land was sold by one Syed Zin to one Low, and that Low had sold it to Ungku. The preliminary objection was taken up on the basis that Ungku entered the disputed portion with the consent of the predecessor-in-title and, thus, was not a trespasser. The issue before the Court was whether it could allow the plaintiff's action, which was commenced by Originating Summons, to continue.

The plaintiff submitted that it was entitled to vacant possession under O. 89 of the RHC by virtue of the fact that it was the registered proprietor of the disputed land wherein the disputed portion stood.

The 1st defendant contended that she entered the disputed portion relying solely on two agreements. The first was the agreement of sale dated 8 October 1936 between Syed Zin (who was a beneficiary of the estate of one Syed Hassan) and Low, wherein the disputed portion was sold to the latter. The other was an agreement dated 17 November 1946 wherein Low sold the disputed portion to Ungku. Ungku also exhibited the Will of Syed Hassan dated 3 March 1932 and the Deed of Family Arrangement made on 10 September 1959.

Counsel for Ungku also argued that the legal ownership of the plaintiff to the disputed land was highly questionable, and that a triable issue had been established which would bar an application under O. 89 of the RHC.

Held:

[1] A person who enters upon the land of another and remains thereat to the detriment of the owner is a trespasser.

[2] The issue document of title to the disputed land did not show Low or Ungku, at any point of time, as the registered proprietors. Once the plaintiff became the registered proprietor on 21 January 1994, Ungku was nothing more than a mere trespasser. Therefore, the preliminary objection raised ought to be rejected.

[3] The disputed land wherein the disputed portion was located was never, at any point of time, sub-divided; the whole piece of the disputed land was finally sold by the surviving trustees to the plaintiff on 21 January 1994. Since the title to the disputed land had not been sub-divided, there was no transfer of the disputed portion from Syed Zin to Low and from Low to Ungku.

[4] The Will clearly stated that the disputed land was not specifically bequeathed to any person named in it. None of the beneficiaries under the Will was entitled to any specific property of the disputed land. As at the date of entering into the Family Arrangement, there were certain outstanding liabilities of the estate, and this liabilities were not ascertained and identified. The beneficiaries of the estate had no interests, legal or equitable, in any of the properties of the estate, in particular the disputed land where the disputed portion was located, until such time when the administration of the estate has been completed and the residue ascertained. The estate of Syed Hassan was incomplete and the residuary had not been ascertained; thus, the beneficiaries of the estate would have no interest in the disputed land.

[5] The exceptions provided for under s. 340 of the National Land Code 1965 ('the NLC') were not raised in Ungku's affidavits; consequently, these exceptions could not apply in the instant case. Once the plaintiff became registered as the proprietor of the disputed land, the title became indefeasible under s. 340 of the NLC.

[6] Ungku was not the registered owner of the disputed portion whereas the plaintiff has indefeasible title, not only to the disputed portion, but to the whole of the disputed land.

[7] Ungku's failure was attributable to his failure to prepare the affidavits to the minutest detail.

Obiter dicta:

[1] The doctrine of *stare decisis* dictates strict observance by the subordinate Courts of the decisions of the superior Courts.

[2] In a trial by affidavit, all parties are advised to put their thoughts in writing so as not to spring surprises onto one another.

[Preliminary objection dismissed. Plaintiff's application allowed]

Cases referred to:

Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman [1995] 1 AMR 761 ***(refd)***

Chong Siew Choong v. Public Prosecutor CLJ JT (14) 1996; [1996] 2 CLJ 823 ***(refd)***

Furness, Withy & Co Limited v. Pickering [1908] 2 Ch 224 ***(foll)***

Bohari bin Taib & 5 Others v. Pengarah Tanah dan Galian Selangor [1991] 1 CLJ 647 SC ***(refd)***

Chiu Wing Wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng [1994] 1 CLJ 313 SC; [1994] 1 MLJ 89 SC ***(refd)***

Liew Yu Fatt v. Teck Guan & Co Ltd. [1966] 1 MLJ 87 ***(refd)***

Wong See Kui v. Hong Hin Tin Mining Co [1969] 2 MLJ 234 ***(refd)***

Segar Restu (M) Sdn. Bhd. v. Wong Kai Chuan [1994] 3 MLJ 530 ***(refd)***

Punca Klasik Sdn. Bhd. v. All Persons In Occupation Of The Wooden House ErecteOn on a Portion Of Land Held Under Grant No: 26977 For Lot 4271 in the Township Of Johor Bahru, Johor and Another Case [1995] 4 BLJ 337 ***(cit)***
Robert Addie & Sons (Collieries) Ltd. v. Dumbreck [1929] AC 358 ***(refd)***
All Persons in Occupation of the Houses and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd. [1996] 4 MLJ 533 ***(cit)***
Bristol Corporation v. Persons Unknown [1974] 1 All ER 593 ***(cit)***
Greater London v. Jenkins [1975] 1 All ER 354 ***(cit)***
Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd. [1991] 1 MLJ 22 ***(cit)***
Esso Malaysia Bhd v. Hills Agency (M) Sdn. Bhd. & Ors. [1994] 1 MLJ 740 ***(refd)***
Ewe Keok Neoh v. Ng Aun Thye [1934] MLJ SSLR Vol III 23 ***(foll)***
Lee Ah Tham & Anor. v. Lee Chun Tek [1978] 1 MLJ 173 FC ***(foll)***
Khoo Teng Seong v. Khoo Teng Peng [1990] 3 MLJ 37 ***(refd)***
Tan Heng Poh v. Tan Boon Thong & Ors. [1992] 2 MLJ 1 SC ***(refd)***
T Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 PC ***(refd)***
Bank Negara Malaysia v. Mohd Ismail & Ors. [1992] 1 MLJ 400 SC ***(refd)***
Voo Min En & Ors. v. Leong Chung Fatt [1982] 2 MLJ 241 FC ***(refd)***
Teh Bee v. Maruthamuthu [1977] 2 MLJ 7 FC ***(refd)***
Ong Chat Pang & Anor. v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***

Legislation referred to:
Land Enactment No: 1, s. 66
National Land Code, ss. 214(1)(a), 340(2)(c), 345(1)
Rules of the High Court 1980, O. 16 r. 2(2), O. 89 r. 1
Rules of Supreme Court (UK), O. 113 r. 1

For the plaintiff - Ng Chew Hor; M/s. Leng & Co.
For the defendants - Sanjay Mohanasundaram; M/s. Skrine & Co.
For Ungku Aziz - Douglas WL Yee; M/s. Skrine & Co.

JUDGMENT

Abdul Malik Ishak J:

By way of Summons-in-Chambers in encl. 15, Ungku Abdul Aziz bin Mohamed ("Ungku Aziz"), one of the defendants in this originating summons, applied for leave to issue a third party notice supported by an affidavit in encl. 14. Though there was no intitulment in encl. 15 citing the relevant sections of the law as required and lucidly set out in *Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 1 AMR 761 and vigorously applied in *Chong Siew Choong v. Public Prosecutor* CLJ JT (14) 1996; [1996] 2 CLJ 823, yet it was, by simple deduction, an application under O. 16, r. 2(2) of the Rules of the High Court, 1980 ("RHC"). Having heard the submissions from both Counsels on 18 October 1995, I refused to accede to the application in encl. 15 and dismissed it with costs for two cogent reasons. Firstly, there was a complete failure to show to my satisfaction in the affidavit in encl. 14 in support of encl. 15, the requirements of paras. (a)

or (b) or (c) of r. 2(2) of O. 16 of the RHC. That affidavit in encl. 14 did not show the nature of the claim made by the plaintiff in the action nor did it show the stage in which the proceedings in the action have reached or for that matter it did not state the nature of the claim made by Ungku Aziz or particulars of the question or issue required to be determined, as the case may be, and the facts on which the proposed third party notice was based. Secondly, on the authority of *Furness, Withy & Co. Limited v. Pickering* [1908] 2 Ch. 224, Ungku Aziz must show a *prima facie* case before leave to issue a third party notice would be issued and he failed to do that. Ungku Aziz must have been satisfied with my rejection of encl. 15 as no appeal was lodged either by him or his Counsel. Be that as it may, the hearing for an O. 89 of the RHC as set out in encl. 4 was adjourned to another date and, on that date, Mr. Awtar Singh for Ungku Aziz requested for an adjournment and when the Court refused to grant an adjournment Mr. Awtar Singh took the easy way out by saying that he would like to withdraw from acting for Ungku Aziz. This was indeed unbecoming of a practising lawyer and I had no choice but to adjourn the hearing to another date. On the next date of hearing, Ungku Aziz was represented by Mr. Sanjay Mohanasundaram and he too requested for an adjournment on the grounds that he had just been retained and he wished to advance a preliminary objection of which notice, in due course, would be given to the plaintiff's solicitor. I reluctantly granted that adjournment. On the next hearing date, Mr. Ng Chew Hor for the plaintiff requested for an adjournment as he was served with an affidavit on Saturday and he needed time to prepare a reply. An adjournment was then granted. Again on the next date of hearing, the case was adjourned to another date. It was opportune that an adjournment was granted because at the next hearing date (this was on 16 February 1996), Madam Marie R Cocheril for Liza James, M. Jeyaletchemy a/p Muthu, A. Kasimmal and one Encik Choke (see the particulars of their names in the memorandum kehadiran as reflected at encl. 8) informed the Court that her clients were not keen in challenging encl. 4 and they were willing to surrender vacant possession of their houses to the plaintiff. Mr. Ng Chew Hor took this opportunity and asked this Court to grant prayer (a) of encl. 4 and an order to that effect was made by this Court.

On 28 March 1996 a preliminary objection was advanced by Mr. Sanjay Mohanasundaram for Ungku Aziz to the effect that the procedure adopted by the plaintiff under O. 89 of the RHC was wrong and it was his submission that the correct procedure was by way of a writ. It was argued that the 10,000 square feet of land ("the disputed portion") forming part and parcel of the land held under title no: 26977 for lot 4271 ("the disputed land") was sold by Syed Zin bin Hassan Al-Attas ("Syed Zin") to Low Kam Moi (f) ("Low") on 8 October 1936 as reflected in the agreement of sale at Exh. "UAAM1" in encl. 7. Low in turn sold the disputed portion to Ungku Aziz on 17 November 1946 as shown in the agreement of sale at Exh. "UAAM2" in encl. 7. It was argued that O. 89 of the RHC was inappropriately invoked by

the plaintiff as Ungku Aziz entered the disputed portion with the consent of the predecessor in title. Incidentally on the disputed portion stood a house that was rented by Liza James and this fact was elicited from Mr. Sanjay Mohanasundaram.

In *Cheow Chew Khoon @ Teoh Chew Khoon (supra)*, Gopal Sri Ram JCA, writing a separate judgment for the Court of Appeal had this to say on O. 89 of the RHC:

> Prior to the introduction of this provision (referring to O. 89 of the RHC) into the Rules, the only proper procedure available in all cases for the recovery of possession of immovable property was a writ action: *Yap Hong Thin v. Seenavasam* [1970] 1 MLJ 143. Indeed, this continues to be the case save and except in the very limited category of cases to which O. 89 applies. It is, as I have said, a summary procedure meant primarily for the eviction of squatters. For, it frequently happens that land or even a building is occupied by persons who are essentially trespassers whose identities are often unknown to the plaintiff. To require a plaintiff, in those circumstances, to commence a writ action and name the defendants would constitute the imposition of an intolerable burden upon him. It is to meet this problem that the Rules Committee passed O. 89. That Order is not meant to be, and, should not be, used for the recovery of property occupied by tenants whose tenancies have come to an end. The words in parenthesis appearing in the first Rule of that Order makes this abundantly clear. The summary jurisdiction that the Order has created is not a substitute for the ordinary action for vacant possession and should not be permitted to be used. Where resort is had to the summary procedure strict compliance of its terms is essential: In *Re 9, Orpen Road, Stoke Newington* [1971] 1 WLR 166.

In *Bohari bin Taib & 5 Others v. Pengarah Tanah dan Galian Selangor* [1991] 1 CLJ 647 SC, Mohd Azmi SCJ speaking for the Supreme Court on the main issue of whether the respondent ought to have sued the appellants by writ instead of by the summary procedure under O. 89 of the RHC and in the course of reviewing the evidence said ´–

> It is the contention of the appellants that after the expiry of the TOL period in 1984, since they and the other farmers have satisfied the post alienation conditions administratively imposed by the respondent, they have acquired legal right or expectation to be issued with land titles, and as such the respondent who is suing on behalf of the state government is not entitled in law to shoo them away summarily under O. 89 as trespassers pure and simple without even any right to compensation relating to their eviction from the land. They claim that they are not squatters of state land in the popular and normal sense, but are either licensees holding over or lawful occupiers of state land with the continued consent of state executive council under the approved alienation. If their occupation of the land is with the continuing consent, implied or expressed, of the state authority, then notwithstanding the expiry of their TOLS, O. 89 is not the proper procedure to be adopted.

In another part of the same case, his Lordship Mohd Azmi SCJ said:

> We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O. 89. Counsel for the appellants has rightly referred to the position of licensees holding over as distinct from squatters in the following judgment of Lawton J in *McPhail v. Persons Names Unknown* [1973] 3 All ER 393 @ 401:
>
> > It follows, in my judgment, that squatters were never able to enlist the aid of the Court of Chancery to resist a writ of possession and they cannot now. The position of tenants and licensees holding over may be different. I have thought it necessary to consider the jurisdiction of the Court to stay execution in such cases.

Yet, in another part of the same case, his Lordship Mohd Azmi SCJ expressed an opinion that merits reproduction (see p. 651):

> In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters *simpliciter* who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellants' occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and other occupiers had been given in 1980 under s. 42 of the National Land Code.

At the bottom of the same page, his Lordship Mohd Azmi SCJ said:

> Finally, it has come to our knowledge that recently in *Mohd Rawi bin Yaacob v. Federal Land Development Authority*, (SCCA no: 02-311 of 1989) another panel of this Court, (Abdul Hamid LP, Gunn Chit Tuan SCJ and Mohd Jemuri SCJ) had in allowing an appeal held that where the entry to the land is lawful, and where there are triable issues, O. 89 is not the proper procedure to be adopted to evict occupiers by order for possession.

In *Chiu Wing Wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng* [1994] 1 CLJ 313 SC; [1994] 1 MLJ 89 SC, the brief facts were that the respondent successfully bidded for four units of pre-war double storey terrace houses at RM141,000 and, at the material time, the appellants as tenants of the previous owner of the properties were in occupation of the properties. The respondent knew that the properties were purchased subject to all rights and liabilities that existed therein and that the properties were under the Control of Rent Act, 1966. Separate notices to quit to the appellants were issued by the respondent's solicitors. The Judicial Commissioner who heard the case in the first instance allowed the respondent's O. 89 of the RHC's application

and gave vacant possession and damages. On appeal to the Supreme Court, Mohd Azmi SCJ said:

> If the appellants are tenants holding over after termination of the monthly tenancy by the notice to quit, then O. 89 is inapplicable. It should be noted that O. 89 has its origin in O. 113 of the English Rules, and the principle behind *McPhail v. Persons, Names Unknown* [1973] 3 ALL ER 393 is clearly to limit the operation of the summary procedure of 1989 to trespassers pure and simple, whether known or unknown. In our view, the summary procedure should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be triable issue on the facts and the law for determination by evidence *viva voce*. In this connection we approve the judgment of Wan Adnan J in *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221 as discussed by Edgar Joseph Jr J (as he then was) at p. 224, and upheld by the Supreme Court in [1991] 1 MLJ 704.

In another part of the same judgment, Mohd Azmi SCJ said:

> The summary procedure under O. 89 is governed by the same principles as those under O. 14 RHC, 1980. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact. It is only in clear cases of trespassing that a summary order can be made under O. 89. The learned Judicial Commissioner did not seem to address his mind sufficiently to the importance of determining the existence or absence of triable issues. It is unfortunate that the learned Judicial Commissioner did not give due consideration to the Federal Court decision of *Leong Young v. Lee Sem Yong* [1968] 2 MLJ 72 (cited to him in argument) where it was held that where reliance is placed on the provision of the Rent Control Act to avoid eviction by landlord, all that the tenant has to do is to show that he is a protected tenant under the Act. In the circumstances, the application by Originating Summons although remedied by the learned Judicial Commissioner to one under O. 89 RHC should be dismissed as there are triable issues of fact and law, and as such the application for vacant possession ought to have been commenced by writ.

On these authorities, it was argued that Ungku Aziz was not a trespasser but had purchased the disputed portion and had stayed there. But alas there was nothing to show by affidavit evidence emanating from Ungku Aziz that he had stayed on that disputed portion in question. As to the meaning of trespass, it is appropriate to refer to some authorities. In *Liew Yu Fatt v. Teck Guan & Co Ltd.* [1966] 1 MLJ 87 at p. 90, McGilligan J said – "Trespass is, basically, an unlawful entry by one person on, or an unlawful interference by one person with, land in the possession of another." In *Wong See Kui v. Hong Hin Tin Mining Co* [1969] 2 MLJ 234, Raja Azlan Shah J (as His Majesty then was) said – "Trespass consists in the intentional intrusion of another's land. It is committed not only by intrusion in person but also by propelling objects on to another's land." In *Segar Restu (M) Sdn. Bhd. v. Wong Kai Chuan* [1994] 3 MLJ 530, I have said something about the meaning of trespass which was subsequently quoted with approval in *Punca Klasik Sdn. Bhd. v. All Persons In Occupation Of The Wooden House Erected On A Portion Of Land*

Held Under Grant No: 26977 For Lot 4271 In The Township Of Johor Bahru, Johor and Another Case [1995] 4 BLJ 337 and this was to this effect: "Reading the pleadings, one would be able to detect the element of trespass. Who is a trespasser? In law, a trespasser is one who wrongfully enters on land in the possession of another and has neither right nor permission to be on the land. Lord Dunedin in *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] AC 358 at p 371 aptly described a trespasser as one who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. That would be a fitting description of the defendants.

With respect, the Court of Appeal in *Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman (supra)* did not consider the decisions of the Supreme Court in *Bohari bin Taib & 5 Others v. Pengarah Tanah dan Galian Selangor (supra)* and *Chiu Wing Wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng (supra)* and, I may add that the doctrine of *stare decisis* dictates strict observance by Subordinate Courts of decisions from Superior Courts (*All Persons in Occupation of the Houses and the Wooden Stores Erected on a Portion of Land Held Under Grant No: 26977 for Lot 4271 in the Township of Johor Bahru, Johor v. Punca Klasik Sdn. Bhd.* [1996] 4 MLJ 533). Be that as it may, Mr. Sanjay Mohanasundaram relied on the affidavit in reply of Sellapan a/l Nalaya affirmed on 4 July 1995 in encl. 11 and drew my attention to encl. "LJ1" therein where there was a letter addressed to Liza James from Ungku Aziz dated 12 January 1965 stating that the house rental was increased wef February 1965 from a paltry RM25 to RM40 per month and it was submitted that by this letter Ungku Aziz was clearly the landlord exercising his right over the tenant by the name of Liza James in regard to the rental. Consequently, it was argued that both Ungku Aziz and Liza James had the rights to occupy the disputed portion wherein the house stood and such rights accrued with the consents of the predecessors in title. That would, so submitted Mr. Sanjay Mohanasundaram, prevent the application of O. 89 of the RHC.

In rebuttal, Mr. Ng Chew Hor argued quite rightly that Ungku Aziz was not the occupier of the house that stood on the disputed portion and that Liza James had on 16 February 1996 consented to surrender vacant possession. It was Mr. Ng Chew Hor's submission that the crucial words appearing in O. 89 of the RHC would be the words in parenthesis that read "not being a tenant or tenants holding over after the termination of the tenancy" and that the word "tenant" must necessarily refer to the tenant of the disputed land. It was rightly pointed out that Mr. Sanjay Mohanasundaram should not have relied on the affidavit in reply of Sellapan a/l Nalaya in encl. 11 as it was not filed for nor was it done on behalf of Ungku Aziz. On perusal of the affidavits filed by Ungku Aziz (encls. 7, 13 and 19), it would be apparent that there was no reference at all to encl. 11. Of pertinence would be the absence of any evidence that there was a tenancy subsisting between Ungku Aziz with

the owner of the disputed land. Ungku Aziz's name too did not appear in the title to the disputed land and this can be seen in the issue document of title at Exh. "GWH1" together with the Malay Grant 1572 in Exh. "GWH2" and the previous title CT 2264 in Exh. "GWH3" – all these exhibits can readily be seen in encl. 3. Of relevance too would be the conspicuous absence of the name of Low on the title to the disputed land. Flowing from these, it was sought to argue that the words in parenthesis in O. 89 of the RHC cannot apply nor relate to Ungku Aziz as he was not claiming to be a tenant of anyone. In *Cheow Chew Khoon @ Teoh Chew Khoon v. Abdul Johari bin Abdul Rahman (supra)*, the plaintiff/respondent there was the registered proprietor of the four pieces of land with a building on it while the defendant/appellant there was the tenant of the former owner and ran a hotel styled "Cathay Hotel" in that building. In *Chiu Wing Wa @ Chew Weng Wah & 3 Others v. Ong Beng Cheng (supra)*, the tenants there held over the tenancy of the rent controlled premises after the notices to quit had been issued. It is interesting to note that Lawton LJ in *McPhail v. Persons, Names Unknown (supra)*, did not express an opinion whether the English RSC O. 113 (the equivalent of our O. 89 of the RHC) would apply to tenants and licensees holding over. Lawton LJ merely said: "The position of tenants and licensees holding over may be different. I have not thought it necessary to consider the jurisdiction of the Court to stay execution in such cases." Mr. Ng Chew Hor argued that Mohd Azmi SCJ (now FCJ) in *Bohari's* case *(supra)* fell in error when his Lordship relied on *McPhail's* case *(supra)* to extend the exception to the applicability of O. 89 of the RHC to "licensees holding over". The exceptions to O. 89 of the RHC would be in regard to the "tenant or tenants holding over after the termination of the tenancy" and these exceptions are clearly set out in the words in the parenthesis to the said order. Mr. Ng Chew Hor further submitted that the correct position of the law would be on the lines as exemplified by *Bristol Corporation v. Persons Unknown* [1974] 1 All ER 593 where the facts were that one Mrs. Daniels was the registered proprietor of a house. In May 1973 it was arranged that Mrs. Daniels would sell it to Bristol Corporation and she then moved to other premises. A representative of the corporation visited the property in June and found a number of people living in the house, which Mrs. Daniels had left empty. On 8 August the corporation became the registered proprietors of the property. In September an officer of the corporation again visited the house and found that it was still occupied by persons whose identities were unknown. The corporation thereupon took proceedings for possession against the occupants by originating summons under RSC O. 113, r. 1. An affidavit was produced, sworn by one of the occupants, in which he stated that he had visited Mrs. Daniels in June to explain their homeless situation to her and that she had "seemed willing to allow (them) to live there provided that she was still able to sell her house". The occupants contended that in the circumstances the corporation were not entitled, under RSC O. 113, r. 1, to a summary order for, if the allegation in the affidavit were substantiated, it would follow that

the occupants had "entered into occupation" with the consent of the corporation's predecessor in title. It was held that on its true construction RSC O. 113, r. 1, covered the case of a person who, although he had entered into occupation of the land with the licence or consent of the person entitled to possession or his predecessor in title, remained in occupation without such licence or consent. It followed that the corporation were entitled to the summary order for possession since the occupants were remaining in occupation without the licence either of the corporation, who at the time of the summons were entitled to possession, or of Mrs. Daniels, who could not give an effective licence to anyone to remain in occupation of the land after she had parted with possession of it. Pennycuick VC after citing the English RSC O. 113, r. 1 which is *in pari materia* with our O. 89 of the RHC said:

> Looking at the words of that rule, it seems to me to be clear that the order covers two distinct states of fact. The first is that of some person who has entered into occupation of the land without the licence or consent of the person entitled to possession or any predecessor in title of his, and secondly that of the person who has entered into occupation of the land with a licence from the person entitled to possession of the land or any predecessor in title of his but who remains in such occupation without the licence or consent of the person entitled to possession or any predecessor in title. That is the true construction appears to be perfectly clear from the use of the word "or" and if the rule did not cover the second state of affairs which I have mentioned, that is to say of entry with licence and remaining in occupation without licence, then the words "or remained" would, so far as I could see, have no significant meaning at all. Obviously there never could be proceedings against someone who had entered but did not remain in occupation of the land.

In the next paragraph of the same judgment, Pennycuick VC continued:

> Applying that construction here and assuming in favour of Mr McConnell's argument that Mrs. Daniels did indeed give a licence to occupy the property, it seems to me that the second alternative in r. 1 plainly applies, that is to say, notwithstanding that they entered into occupation with the licence of Mrs. Daniels who was then entitled to possession of the land, they are now remaining in occupation without the licence either of the plaintiffs who are now entitled to possession of the land or that of Mrs. Daniels who cannot possibly have given an effective licence to anyone to remain in occupation of the land after she herself had parted with it in favour of the plaintiffs. Unless there is any more to it, seems to me that the present case falls squarely within the terms of RSC O. 113, r. 1.

The scope of the English RSC O. 113 which corresponds with CCR O. 26 was discussed in the Court of Appeal case of *Greater London Council v. Jenkins* [1975] 1 All ER 354 where Lord Diplock LJ said:

> I may mention briefly, in order to get it out of the way, a submission made on behalf of the appellant that the procedure under CCR O. 26 was not available in cases where a person remains on as a trespasser after the determination of a

licence which he had previously held to remain on the land. That submission was really based on a note which appears in the current Supreme Court Practice making a suggestion to that effect.

The matter was dealt with in *Bristol Corporation v. Persons Unknown* [1974] 1 All ER 593, [1974] 1 WLR 365, where Pennycuick VC had occasion to construe the corresponding rule, which is in identical words, in RSC O. 113. The relevant words of CCR O. 26, r. 1(1) read thus –

> Where a person claims possession of land which he alleges is occupied solely by a person or persons ... who entered into or remained in occupation without his licence or consent ... .

Pennycuick VC pointed out that it is clear beyond a peradventure that this order applies to cases where a person who is alleged to be a trespasser was previously on the premises by licence.

In the course of his judgment in that case Pennycuick VC did suggest that the Judge or the Court had a discretion whether to permit this summary procedure to be used in cases where there had been, as in this case clearly, a licence to occupy originally. For my part, I am unable to see that the Court has any discretion to prevent a plaintiff under this procedure where the circumstances are those described in the rule. So, while agreeing, as I do, with Pennycuick VC's construction of the rule, I personally would disagree that the Court has any discretion to prevent the use of this procedure where circumstances are such as to bring them within its terms.

In my judgment, *McPhail (supra)* did not say that the English RSC O. 113 do not apply to a licensee holding over or for that matter it did not say that the English RSC O. 113 cannot be used to evict a licensee holding over – in fact the matter was left open. It was *Bristol Corporation (supra)* that explicitly laid down the principle that the English RSC O. 113 applies to a person who has entered into possession of land with a licence from the previous owner but has remained in occupation without a licence from the present owner and the previous owner cannot possibly have given an effective licence to that person to remain in occupation of the land after the previous owner had parted with that land in favour of the present owner. A strict interpretation was adopted in construing the English RSC O. 113 by the Court of Appeal in *Greater London Council (supra)* when Lord Diplock LJ said –

> ... I personally would disagree that the Court has any discretion to prevent the use of this procedure where circumstances are such as bring them within its terms.

It is perhaps opportune to set out O. 89, r. 1 of the RHC in verbatim:

> Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without

> his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.

In plain language, it means that where an entry is legal, its continued occupation may be tainted and the present owner may proceed by way of an originating summons to oust the trespasser. This order, for fear of repetition, will not apply to tenants holding over the land after the termination of tenancy or tenancy or licence granted by any predecessor in title. All the authorities show a similar trend and that trend is this – a person who enters upon another's land and remains thereto to the detriment of the owner is a trespasser pure and simple (see as an example *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221). Idris Yusoff J in *Esso Malaysia Bhd v. Hills Agency (M) Sdn. Bhd. & Ors.* [1994] 1 MLJ 740 aptly paraphrases the law in these words:

> The law is settled that the summary proceedings for possession of land can be employed in a situation where a person entitled to possession of the land claims possession of such land occupied by another person without his licence or consent or the licence or consent of any of his predecessor-in-title or in another situation where a person who has entered into occupation of the land with the licence or consent of the person entitled to possession of the land or any of his predecessor-in-title but remains in such occupation without licence or consent of the person entitled to possession or any predecessor-in-title of his.

Before me, the plaintiff exhibited the issue document of title to the disputed land wherein the disputed portion stood and it showed clearly that the plaintiff became the registered proprietor on 21 January 1994. For fear of repetition, the issue document of title to the disputed land did not show that Low or Ungku Aziz, at any point of time, as the registered proprietors. If indeed Low purchased the disputed portion from Syed Zin and subsequently Low sold it to Ungku Aziz, why, one may ask, were their names not on the title? It was never suggested that Ungku Aziz was a tenant or a tenant holding over after the termination of the tenancy and if that was what Ungku Aziz wanted to project himself, which was not adverted to at all in his affidavits, then the plaintiff had correctly adopted the right procedure to assert their claim over the disputed portion. Ungku Aziz seemed to say that he was the landlord to the disputed portion when he purchased it from Low and this was used as a leverage by Mr. Sanjay Mohanasundaram to drive home the point that O. 89 of the RHC was not the appropriate procedure to adopt and that the proper mode would be by way of a writ. However, the registered document of title to the disputed land wherein the disputed portion stood as shown in Exh. "GWH1" of encl. 3 do not bear the name of Syed Zin and that being the case he cannot sell the disputed portion which he did not have to Low and, consequently, the purported sale by the latter to Ungku Aziz was equally infected. Once the plaintiff became the registered proprietor on 21 January 1994, Ungku Aziz's was nothing more than a mere trespasser and, consequently,

on 29 March 1996, I ruled that the preliminary objection raised by Mr. Sanjay Mohanasundaram ought to be rejected with costs. To date, there was no appeal in regard to this ruling.

On 5 April 1996, the originating summons in encl. 4 was heard by me. Mr. Ng Chew Hor emphasised and put to the forefront the fact that the plaintiff was registered as the proprietor of the disputed land wherein the disputed portion stood, as the backbone of his case and, on that score, he said that the plaintiff was entitled to vacant possession under O. 89 of the RHC. Ungku Aziz by way of an affidavit-in-reply alleged that he entered the disputed portion relying solely on two agreements. One was an agreement of sale between Syed Zin, one of the beneficiaries of the estate of Syed Hassan bin Ahmad Al-Attas, and Low dated 8 October 1936 wherein the disputed portion was sold to the latter. This agreement was exhibited as "UAAM1" in encl. 7 and it brings forth an interesting question of whether by this agreement there was passing of title to the disputed portion to Low? The other was an agreement dated 17 November 1946 where Low sold the disputed portion to Ungku Aziz as reflected in Exh. "UAAM2" of encl. 7. It is interesting to note that the agreement dated 17 November 1946 wrongly described Low as the "registered owner" of the disputed portion – an assertion which as can be seen later to be false.

The disputed land wherein the disputed portion was located was never at any point of time sub-divided and the whole chunk of that disputed land was finally sold by the surviving trustees to the plaintiff on 21 January 1994 as reflected in Exh. "GWH1" in encl. 3. The disputed land were formerly comprised in Malay Grant No: 1572 (Exh. "GWH2" of encl. 3) and C.T. 2264 (Exh. "GWH3" of encl. 3) respectively and on these titles there was a noticeable absence of the name of Low. Since the title to the disputed land had not been sub-divided, there was consequently no transfers of the disputed portion from Syed Zin to Low and from Low to Ungku Aziz. Ungku Aziz did not allege that there was an execution of any instrument of transfer in whatever form but merely sought to rely on the two agreements which had been referred to earlier. Section 26A of the Land Enactment No: 1 which was introduced by way of an amendment on 25 March 1941 (see the *Johore Government Gazette* of 30 April 1941 *vide* Notification No: 462) enacts that:

> An undivided share in land may be transferred, transmitted, devised or charged, but no area not being the whole area of the land comprised in any document of title shall be transferred or charged until the land shall have been divided by survey and fresh documents of title registered.

In a nutshell, s. 26A of the Land Enactment No: 1 allows the transfer of the whole portion of an undivided share but bars the transfer of the disputed portion out of the disputed land which was held under and in one title. An equivalent provision is also found in s. 214(1)(a) of the National Land Code ("NLC") where the whole, but not a part of the alienated land can be transferred.

By an affidavit in encl. 19, Ungku Aziz exhibited the will of Syed Hassan bin Ahmad Al-Attas dated 3 March 1932 and by that will it was clearly stated that the disputed land formerly known as Malay Grant No: 1572 was not specifically bequeathed to any person named in the will. Consequently, it is my judgment that the executors and trustees under the will would have to deal with the disputed land under clause 14 of the will as reflected in Exh. "UA1" of encl. 19. This meant that none of the beneficiaries under the will as seen at clause 14 was entitled to any specific property of the disputed land. Under clause 14 of the will, the executors and trustees mere supposed to sell and divide the proceeds of sale according to the Mohamedan Law. This meant that the beneficiaries of the estate were only entitled to the residue of the estate. I am asked to take judicial notice that under Mohamedan Law the heirs are entitled to a certain share according to the "faraid" issued by the Majlis Ugama Islam Johor Bahru and, without hesitation, I so do.

Ungku Aziz too exhibited a deed of family arrangement made on 10 September 1959 marked as Exh. "UA2" of encl. 19 and one cannot help but to observe that the deed of family arrangement was made after the agreement of sale dated 8 October 1936 between Syed Zin and Low was executed (Exh. "UAAM1" of encl. 14) and after the agreement of sale executed between Low and Ungku Aziz was effected on 17 November 1946 (Exh. "UAAM2" of encl. 14). As at the date of entering into the family arrangement there were certain outstanding liabilities of the estate and these liabilities were not ascertained and identified. Consequently, clause 3 of the family arrangement specifically provides that the liabilities of the estate must be settled from the assets of the estate before steps can taken to wind up and distribute the residue. In my judgment, the beneficiaries of the estate have no interests legal or equitable in any of the properties of the estate in particular the disputed land where the disputed portion was located therein until such time when the administration of the estate has been completed and the residue ascertained. I am fortified in my view by the decision of the Privy Council in the case of *Ewe Keok Neoh v. Ng Aun Thye* [1934] MLJ SSLR Vol. III at p. 23, where the headnote reads as follows:

> Until the estate has been fully administered the beneficiary has no property in any specific investment forming part of the estate or in the income from any such investment. There is nothing which a beneficiary could assert to be or to represent his share, the whole both *corpus* and income being the property of the executors for purposes of administration.

It is a correct assertion of the law that anything belonging to the estate must necessarily belong to the executors and the beneficiaries have no right to assert that they have any interests or rights to the properties of the estate until the estate has been fully administered. In *Lee Ah Tham & Anor. v. Lee Chun Tek* [1978] 1 MLJ 173 FC, the Federal Court had occasion to consider whether the residuary beneficiaries of an estate under a will had power to lodge a

caveat and answered it in the negative. Briefly, the facts in that case were that the appellants who claimed to be beneficiaries under the will of their deceased father had brought an administration suit against the executor and they had caveated the land belonging to the estate. The respondent applied to have the caveat removed and the learned Judge of the High Court made an order accordingly. The appellants appealed to the Federal Court and it was held that the appellants as residuary beneficiaries, did not have a caveatable interest in the lands since the administration of the estate was incomplete and the residue was unascertained. Of pertinence is the judgment of Lee Hun Hoe CJ (Borneo) (as he then was) at p. 176 that aptly applies to the present situation and for brevity it is reproduced hereinunder:

> The testator's property was vested in his executor for the purpose of administration of his estate and no one else has any property interest on such property. It may seem incredible to deny to a residuary beneficiary any interest in those assets of an incomplete administered estate. It has been mistakenly assumed that for all purpose and at every moment of time the law requires the existence of two different kinds of estate or interest in those properties, the legal and equitable. Lord Radcliffe made the position very clear in *Livingston's* case [1964] 3 All ER 692, when he said at p. 699:
>
> > There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the Court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.

In another part of the same judgment, Lee Hun Hoe CJ (Borneo) (as he then was) aptly pointed out the obvious when he said:

> What appellants have under the will is the right to sue the executor or trustee if he has not administered the estate properly. That right has been exercised by them and that is a pending suit.

In *Khoo Teng Seong v. Khoo Teng Peng* [1990] 3 MLJ 37, Lim Beng Choon J sets out the law in these words:

> The legal principle that a legatee of a share in residue has no interest in any property of the testator until the residue has been ascertained and that his right is only to have the estate properly administered and applied for his benefit when the administration is complete has been unanimously voiced by judicial opinions stretching over a period of nearly 100 years. The leading case advocating this principle is the case of *Lord Sudeley & Ors. v. AG* [1897] AC 11. Lord Halsbury said in that case at pp. 15 and 16:

> The thing that the legatee was entitled to was one-fourth share of a residuary estate, consisting, it may be, of many things; and I think it was fallacious on the part of Mr. Channel to say that the residue was very nearly ascertained, because the question is not only of amount – although I think that of itself would not be sufficient if it were only of amount – but it is a question of substance as well as a question of amount. It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things – it may consist of only a sum of money – and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say "I will have this or that part of assets". If a trustee is to be the character filled, the *cestui que trust* has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted'.

In *Tan Heng Poh v. Tan Boon Thong & Ors.* [1992] 2 MLJ 1 SC, Mohamed Azmi SCJ delivering the judgment of the Supreme Court succinctly said:

> In law, the residuary beneficiaries had no 'interest' in the lands before administration was completed and therefore had no caveatable claim or interest under s. 323(1). Similarly, in *Khoo Teng Seong v. Khoo Teng Peng* [1990] 3 MLJ 37, Lim Beng Choon J on the undisputed facts of the case should have found what in effect was a trust for conversion under the will. In that case, the 19 residuary beneficiaries including the two caveators were entitled to certain shares of the residue and the caveats were entered to restrain the executor of the will from transferring the testator's land under a sale and purchase agreement to a company at a price allegedly below the market value. Both *Lee Ah Thaw* [1978] 1 MLJ 173 and *Khoo Teng Seong* [1990] 3 MLJ 37 applied the established principle that where the administration is incomplete 'the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained'.

On the strength of the will, the beneficiaries do not have a specific claim in the disputed land wherein the disputed portion stood. The beneficiaries were only entitled to the proceeds of sale of the properties. For fear of repetition, it is apt to say that under clause 3 of the deed of family arrangement the liabilities of the estate were still outstanding and its full impact have yet to be ascertained. It can safely be assumed that by 10 September 1959 (the date of the deed of family arrangement), the debts of the estate have not been satisfied and, consequently, an irresistible conclusion can be arrived at in that the estate of the late Syed Hassan bin Ahmad Al-Attas was incomplete and the residuary has not been ascertained. Applying the principles of law enunciated by the authorities, the beneficiaries of the estate would have no interests in the disputed land.

Now, reverting back to the two agreements in Exhs. "UAAM1" and "UAAM2" of encl. 7 dated 8 October 1936 and 17 November 1946 respectively, it was correctly submitted that these two agreements were worthless pieces of documents, devoid of any legal sanctity. Since the estate was still incomplete and the residuary has not been ascertained as at 10 September 1959, the beneficiaries have no specific interests in the disputed land. Consequently, Syed Zin had no legal capacity to sell the disputed portion to Low and the latter did not acquire that portion. By way of a chain reaction Low too could not have sold that disputed portion to Ungku Aziz. It is interesting to note that in recital 3 of the agreement of sale in Exh. "UAAM1" of encl. 7, Syed Zin as the vendor was described as "will be entitled as part of his share or shares of vacant land having an approximate area of 10,000 square feet" and not as the "registered proprietor of 10,000 square feet". Events have shown that Low was never at any point of time on the register document of title of the disputed land and the agreement of sale in "UAAM2" of encl. 7 as stated somewhere in the early part of this judgment which described Low as the "registered owner" was clearly in error. What is now certain is this. The plaintiff's name has, since 21 January 1994, been on the register document of title of the disputed land. Lord Diplock in *T Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 PC said at p. 269:

> In the National Land Code it is s. 340 that expressly provides that the title of a person registered as proprietor of any land shall be indefeasible. The only exceptions are where there has been fraud, misrepresentation, forgery or an *ultra vires* acquisition purporting to have been made under statutory authority. None of these exceptions apply to the instant case.

Ungku Aziz in his several affidavits did not raise any of the exceptions to indefeasibility under s. 340 of the NLC, and, for the reasons adumbrated above, I would grant the prayers sought for in encl. 4.

Lest I be accused of an oversight, I have taken into account the submissions of Mr. Douglas WL Yee who acted for Ungku Aziz. I have put to the forefront of my mind the sage words of Mohamed Azmi SCJ in *Chiu Wing Wa @ Chew Weng Wah & 3 Ors. v. Ong Beng Cheng (supra)* to the effect that:

> The summary procedure under O. 89 is governed by the same principles as those under O. 14 of the RHC, 1980. To entitle a defendant to a trial, all he needs to do is to show that there is a triable issue of law or fact.

It was argued that the register document of title to the disputed land in Exh. "GWH1" of encl. 3 showed the names of two trustees transferring the title to the plaintiff in sharp contrast to para. 6 of encl. 3 which showed the names of four trustees to the disputed land. There was, it was submitted, a total lack of evidence in the plaintiff's affidavit to show that the trust instrument gave the trustees the authority to act by a majority instead of in unison. This submission must have been an afterthought. It was grounded on an attack to

the indefeasibility of title held by the plaintiff which was not adverted to at all in the affidavits of Ungku Aziz. Mr. Ng Chew Hor was quick to retort. He submitted that the plaintiff acquired title from the surviving trustees. Indeed this was an appropriate submission as s. 345(1) of the NLC covers the situation of the like nature. From the available evidence the plaintiff did not acquire the title to the disputed land "in the purported exercise of any power or authority conferred by any written law" as envisaged under s. 340(2)(c) of the NLC but rather by a private sale. From the Bar, Mr. Ng Chew Hor informed me that one of the four trustees had since passed away and he could not ventilate this fact as it was not raised by Ungku Aziz in his several affidavits. In a trial by affidavit parties are advised to put their thoughts in writing so as not to spring surprises to the opposing party. This was not the case here and, consequently, I accepted the explanation of Mr. Ng Chew Hor from the Bar that he was caught by surprise.

Next, Mr. Douglas WL Yee submitted that there was a possibility that Ungku Aziz was the legal owner of the disputed portion and that being the case, O. 89 of the RHC was not the correct procedure to adopt. This submission should not have been advanced before me as the preliminary objection on procedure was rejected with costs on 29 March 1996 without any appeal being lodged against it. This was an attempt by Mr. Douglas WL Yee to re-open the procedural objection in blatant disregard to the Court's ruling on 29 March 1996. I refused to entertain the procedural objection.

The words appearing in para. (f) of the deed of family arrangement particularly the words "shall be given effect" were emphasised to drive home the points that the sale from Syed Zin to Low and from Low to Ungku Aziz should be given effect and its valid determination could only be effected by trial *viva voce.* But para. (f) of the deed of family arrangement contains a caveat in that if an assignment cannot be given effect then whatever money that has been paid will have to be refunded to the assignee. As stated somewhere in this judgment by 10 September 1959 the debts of the estate have not been satisfied and its residuary not ascertained – this meant that Syed Zin had no interest to the disputed land particularly the disputed portion and he cannot therefore sell it to Low; and what Low did not have cannot also be sold to Ungku Aziz. Syed Zin should therefore refund the purchase money to Low.

Finally, Mr. Douglas WL Yee argued that the legal ownership of the plaintiff to the disputed land was highly questionable and it went to the very root of the application under O. 89 of the RHC. Flowing from this, it was said that a triable issue had been established which would bar an application under O. 89 of the RHC. This brings me to the question of what is a triable issue? Mohamed Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail & Ors.* [1992] 1 MLJ 400 SC said:

> The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the Court.

In *Voo Min En & Ors. v. Leong Chung Fatt* [1982] 2 MLJ 241 FC, Salleh Abas FJ (as he then was) emphasised that an issue must first be regarded as an arguable issue before it is said to be triable. This was how his Lordship put it:

> That being the case, it is not enough for the respondent in answer to the appellants' application to sign final judgment, to raise an issue, or any issue. He must, however, raise such issue as would require a trial in order to determine it. In other words, the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene, MR in *Cow v. Casey* [1949] 1 KB 474, 481, 'when the point is understood and the Court is satisfied that it is really unarguable', the appellants should be entitled to what they prayed for in the Summons-in-Chambers.
>
> In our view the point raised by the respondent as to the existence of an oral agreement to renew the lease of the ground floor of the demised premises in this case is really not an arguable issue as it is neither effective, nor admissible, and therefore does not constitute a triable issue. The appellants should be and are therefore allowed to sign final judgment in terms of the Summons-in-Chambers.

On the facts of the present case, the attack on the indefeasibility of title of the plaintiff to the disputed land came too late in the day. If the issue of indefeasibility goes to the root of the plaintiff's title to the disputed land as alleged, Ungku Aziz saw it fit not to raise it in his affidavits as per encls. 7, 13, 14 and 19. Ungku Aziz did not allege that there were fraud, misrepresentation, or that the registration was obtained by forgery, or by means of an insufficient or void instrument or that the title or interest was unlawfully acquired in the purported exercise of any power or authority conferred by any written law. In short, the exceptions as provided for under s. 340 of the NLC were not raised in the affidavits of Ungku Aziz and, consequently, it is my judgment that these exceptions do not apply in the instant case. Once the plaintiff became registered as the proprietor of the disputed land, the title became indefeasible under s. 340 of the NLC. Upon registration, the plaintiff obtains an indefeasible title to or interest in the disputed land, and this meant that the plaintiff has a title or an interest which is free of all adverse claims or encumbrances not noted on the register (*Teh Bee v. Maruthamuthu* [1977] 2 MLJ 7 FC; *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224).

Reverting back to the point that the trustees must act in unison and not by a majority, it is interesting to note that the agreement of sale between Syed Zin and Low as reflected in Exh. "UAAM1" of encl. 7 was signed solely by Syed Zin and no where did it mention that there was a necessity to obtain the

consents of all the trustees. That agreement of sale described Syed Zin as not having an existing entitlement to the disputed portion but rather as one who "will be entitled" to it. It is crystal clear that Syed Zin purportedly sold to Low something which he did not have and, consequently, Low did not have title to the disputed portion to enable her to sell it to Ungku Aziz. Section 66(i) of the Land Enactment No: 1 enacts, *inter alia,* that when land is intended to be transferred the registered proprietor shall execute a transfer substantially in the form contained in Schedule M (ii) hereto. Alas, Ungku Aziz failed to exhibit the Schedule M (ii) forms in all his affidavits. It is a sad observation to make that the trustees have failed to discharge their duties under the deed of family arrangement. The beneficiaries too under clause 3 of the deed of family arrangement were supposed to render all possible assistance to the trustees by obtaining the particulars of all the liabilities of the estate and going by the affidavits of Ungku Aziz this was not done. Clause 8 of the deed of family arrangement authorised the trustees to divide the disputed land and then transfer them to the beneficiaries and this too was not done until the whole chunk of the disputed land was sold by the surviving trustees to the plaintiff.

Another interesting facet to the whole case emerges upon perusal of the Court order as exhibited in encl. 19 as Exh. "UA3". At p. 7 of that Court order under para. (b) the following words appeared:

The following claims to properties belonging to the estate of the testator should not be admitted, *viz*:

Claim Not Admitted

Dates of Rejection	Court Dockets	Names of Claimants of	Particulars Properties
8/7/1953	12	Ungku Abdul Aziz bin Mohamed	10,000 sq. feet – Jalan Ngee Heng, Malay Grant No: 1572

Thus, to all intents and purposes Ungku Aziz's claim in the High Court had been rejected on 8 July 1953. That being the case, how could the deed of family arrangement be executed on 10 September 1959? The conclusion is irresistible. Ungku Aziz was not the registered owner of the disputed portion whereas the plaintiff had indefeasible title not only to the disputed portion but also to the whole of the disputed land.

On a review of the available evidence, I have no hesitation to dismiss encl. 4 with costs. Ungku Aziz cannot seek his remedy in this Court and his failure

is attributable to the failure of his solicitors to prepare the affidavits to its minutest detail. As to what Ungku Aziz might do next, it is best left to him.

Reported by Harjit Singh